UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

SILICON VALLEY SELF DIRECT, LLC, d/b/a CALIFORNIA LABOR FORCE,

Plaintiff,

v.

PAYCHEX, INC., et al.,

Defendants.

Case No. 5:15-cv-01055-EJD

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO COMPEL ARBITRATION, OR TRANSFER VENUE AND STAY PROCEEDINGS, OR DISMISS

Re: Dkt. Nos. 21, 29

Plaintiff Silicon Valley Self Direct LLC d/b/a California Labor Force ("CLF") alleges in this action that Defendants Paychex, Inc. and Paychex Insurance Agency, Inc. (collectively, "Paychex") caused CLF to lose its workers' compensation insurance coverage. In response, Paychex moves to compel arbitration based on the agreement it contends governs the parties' business relationship. See Docket Item No. 21. Alternatively, it moves to transfer this action to the Western District of New York or to dismiss CLF's claims pursuant to Federal Rule of Civil Procedure 12(b)(6). CLF opposes all of Paychex's requests.

Federal jurisdiction arises pursuant to 28 U.S.C. § 1332. Having carefully reviewed the pleadings, the court has determined that CLF's claims are subject to arbitration but that certain portions of the arbitration clause must be severed for that proceeding to be a fair one. Accordingly, the motion to compel will granted in the manner stated below and Paychex's remaining requests will be denied.

I. BACKGROUND

The court begins with the facts alleged in the First Amended Complaint ("FAC"). CLF is a California company which commenced business in Santa Clara County in 2013. See FAC, at ¶ 2, 3. It employs multiple highly skilled workers in various areas of expertise which it then places with companies who have a need for a particular skill. Id. at ¶ 2.

In or around October, 2013, CLF retained Paychex to provide payroll services for CLF's business. Id. at ¶ 6. During these discussions, "Defendant Paychex, Inc. used and held Defendant Paychex Insurance Agency, Inc. out as its agent to provide services for and in communicating with CLF." Id. at ¶ 4. CLF mentioned to Paychex that it needed to obtain workers' compensation insurance for its employees before it could commence operations. Id at ¶ 6. Since Paychex represented to CLF that it provided insurance brokerage services and could assist in obtaining workers' compensation coverage, CLF hired Paychex to procure a policy. Id.

Once engaged by CLF, "Paychex was in charge of . . . completing the application for insurance." Id. at ¶ 8. Paychex also interfaced with the proposed insurers to determine the information necessary for the insurance application, including descriptive codes. Id. CLF cooperated with Paychex by providing all necessary information, and "relied on Paychex's claimed superior knowledge and expertise in responding to Paychex's requests for information and in connection with the application process." Id. CLF specifically informed Paychex about the specific nature of its business, including the fact that CLF was in the business of providing temporary labor to construction and other companies. Id. Paychex used this information to submit an application to State Compensation Fund ("State Fund"). Id. In late December, 2013, Paychex notified CLF that it had successfully obtained a workers' compensation insurance policy from State Fund, and CLF immediately commenced full business operations. Id. at ¶ 9.

However, in early 2014 and unbeknownst to CLF, State Fund began to scrutinize the application submitted by Paychex to obtain the CLF policy. Id. at ¶ 11. On February 5, 2014, State Fund notified Paychex that it had cancelled CLF's policy. Id. CLF was then notified of the

cancellation by a letter it received from State Fund on or about February 10, 2014. Id. at ¶ 12. According to the letter, State Fund determined the application submitted by Paychex on behalf of CLF contained inaccurate and erroneous information. Id. CLF was later informed by Paychex that State Fund was unaware that CLF was a temporary staffing company and that the wrong codes were included on the application form. Id. CLF had to halt its business activities due to the loss of insurance coverage. Id.

Although Paychex informed CLF that it was attempting to reinstate the State Fund policy, it was ultimately unsuccessful in doing so. Id. at ¶¶ 13-15. On June 2, 2014, CLF engaged a different insurance broker who obtained a new policy with State Fund within six weeks. Id. at ¶ 15.

CLF initiated this action in Santa Clara County Superior Court on February 3, 2015. Paychex removed it to this court on March 6, 2015. CLF filed the FAC on March 24, 2015, asserting negligence, breach of contract and deceit against both defendants. This motion followed on April 10, 2015.

II. LEGAL STANDARD

Pursuant to the FAA, 9 U.S.C. § 1 et. seq., a written arbitration agreement is "valid, irrevocable, and enforceable" in much the same way as any other contract or contractual provision. 9 U.S.C. § 2; see also Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 67 (2010). "A party to a valid arbitration agreement may 'petition any United States district court for an order directing that such arbitration proceed in the manner provided for in such agreement.'" Lifescan, Inc. v. Premier Diabetic Servs., Inc., 363 F.3d 1010, 1012 (9th Cir. 2004) (quoting 9 U.S.C. § 4). When such a request is made, two questions must be answered: whether an arbitration agreement exists and whether it encompasses the dispute at issue. See id. at 1012; see also Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1130 (9th Cir. 2000). If the party seeking arbitration establishes these two factors, the court must compel arbitration. 9 U.S.C. § 4; Chiron, 207 F.3d at 1130.

A motion to compel arbitration should be denied if "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." AT&T Techs., Inc. v. Commc'n Workers, 475 U.S. 643, 650 (1986). Moreover, arbitration should be denied if the court finds "grounds as exist at law or in equity for the revocation of any contract," such as fraud, duress or unconscionability. 9 U.S.C. § 2; Rent-A-Center, 561 U.S. at 68.

III. DISCUSSION

A. An Arbitration Agreement Exists between CLF and Paychex

"[T]he party seeking to compel arbitration[] has the burden of proving the existence of an agreement to arbitrate by a preponderance of the evidence." Knutson v. Sirius XM Radio Inc., 771 F.3d 559, 565 (9th Cir. 2014). Paychex must satisfy that burden for this motion. In an effort to do so, it produced an eight-page written agreement entitled "Paychex Productivity Services Agreement" (the "PPSA"), which contains the following clause on page 4:

> **Governing Law and Arbitration.** The Agreement and all aspects of the relationship between Paychex and Client shall be governed exclusively by the laws of the State of New York without regard to, or application of, its conflict of laws, rules, and principles, except for the arbitration agreement contained herein which shall be governed exclusively by the Federal Arbitration Act, 9 U.S.C. section 1 et seq. (the "FAA"). **Except as provided herein, any dispute arising out of, or in connection with, the Agreement will be determined only by binding arbitration in Rochester, New York, in accordance with the commercial rules of the American Arbitration Association.** Arbitrable disputes include, without limitation, disputes about the formation, interpretation, applicability, or enforceability of this Agreement. . . .

See Decl. of Brian P. Madrazo ("Madrazo Decl."), Docket Item No. 21, at Ex. A (emphasis in original).

The version of the PPSA produced by Paychex also bears on the first page of the document the signature of an "Authorized Officer" from CLF under the typewritten name "Mauricio Mejia," and is dated January 5, 2014. Id. Mauricio Mejia is the President of CLF. See Decl. of Mauricio Mejia ("Mejia Decl."), Docket Item No. 25, at ¶ 1. Based on this evidence, it appears the PPSA

qualifies as an agreement to arbitrate.

In response, CLF argues that the arbitration clause was not made part of the agreement signed by Mejia on January 5, 2014. According to Mejia, the document he signed on that date consisted of only one page. Id. at ¶ 6. Mejia further states that he was never told the provisions contained in the additional seven pages were included as part of the contract. Id. He also denies ever reading or agreeing to any terms in addition to those listed on the signature page, and claims he understood that additional provisions would be applicable only if certain boxes were checked. Id. at ¶¶ 6-8.

Whether or not Mejia agreed to the subsequent seven pages of the PPSA, including the arbitration clause contained therein, is a question that must be answered under state contract law. See Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 892 (9th Cir. 2002). In California, "[e]very contract requires the mutual assent or consent of the parties." Meyer v. Benko, 55 Cal. App. 3d 937, 942 (1976). It may be manifested in several ways - in writing, through speech or by conduct - and "may be implied through action or inaction." Knutson, 771 F.3d at 565. "Thus, 'an offeree, knowing that an offer has been made to him but not knowing all of its terms, may be held to have accepted, by his conduct, whatever terms the offer contains.'" Id. (quoting Windsor Mills, Inc. v. Collins & Aikman Corp., 25 Cal. App. 3d 987, 991 (1972)). Ultimately, "[t]he existence of mutual consent is determined by objective rather than subjective criteria, the test being what the outward manifestations of consent would lead a reasonable person to believe." Meyer, 55 Cal. App. 3d at 943.

Here, several facts are relevant to the existence of mutual consent. First, Paychex has convincingly demonstrated that one of its sales representatives, Joanna Berner, provided Mejia with the additional seven pages of the PPSA by e-mail on January 6, 2014, after an in-person meeting with Mejia. See Decl. of Joanna Berner, Docket Item No. 28, at ¶ 4. Mejia confirmed

receipt of Berner's e-mail by responding to it later that same day. Id. at ¶ 5.[1]

Second, the signature page of the PPSA contains numerous and notorious references to contractual provisions outside of those described on that page. The second paragraph of the document includes the following sentence: "Services are described in the Product Terms and Conditions section of this Agreement." See Madrazo Decl., at Ex. A. The next section includes a similar reference: "Productivity Services includes the Services set forth below as described in the Product Terms and Conditions section of this Agreement." Id. Also, directly above the signature section is the following sentence: "Client warrants that it possesses fully power and authority to enter into this Agreement, and has read and agrees to the terms and conditions set forth in sections 1-25 of this Agreement." Id. Furthermore, below the signature section is a reference that the page Mejia signed is "1 of 8." Id.

Third, the additional seven pages of the PPSA look and read like a contract, and its terms are conspicuous. Of particular relevance to this motion is the appearance of the arbitration clause itself, which is clearly labeled and emphasized in bold type.

Under an objective lens, the "outward manifestations of consent" demonstrate that Mejia must have agreed to the terms "set forth in sections 1-25" of the PPSA by signing the first page of that document. Mejia's subjective belief that the PPSA consisted only of one page is unreasonable in light of his same-day acknowledgement of Berner's e-mail which provided him with the additional pages. That position is further undermined by the numerous references to additional "Product Terms and Conditions" on the PPSA's signature page as well as the numbering notation on the bottom of the page, which notifies the signer that the complete contract consists of a larger document.

In addition, Mejia's contention that he did not understand the additional provisions to be part of the contract unless certain boxes were checked is an unreasonable interpretation of the

[1] CLF's motion for leave to file a surreply or to strike new evidence (Docket Item No. 29) is DENIED.

signature page. The most telling reference to the existence and incorporation of the additional provisions is situated directly above his signature. Notably, that statement is not qualified with a box-checking requirement; instead, it unconditionally affirms the signer has agreed to all of the PPSA's provisions. Any alternative understanding resulting from a neglectful review of that statement or any other provision of the PPSA is not a basis to escape the effect of the complete contract, including the arbitration clause. See Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, 89 Cal. App. 4th 1042, 1049 (2001) (holding that "ordinarily one who signs an instrument which on its face is a contract is deemed to assent to all its terms," and that "[a] party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing.").

Similarly, there can be no mistake about the character of the last seven pages of the PPSA. Given their appearance and the language used, they are obviously part of a larger contract. See Rodriguez v. Am. Techs., Inc., 136 Cal. App. 4th 1110, 1123-24 (2006) (concluding that a document which seems "like a contract" and referenced additional terms, including an arbitration clause, above the signature line, was conspicuous enough for the signer to assent to all of its terms). And since these pages contain provisions that correspond with the references on the signature page, Mejia could not have reasonably thought they were anything other than the remaining terms of the PPSA.

This is not a case involving a plaintiff who leaves a business transaction unaware of an agreement to arbitrate because a copy of the agreement was never provided. See, e.g., Knutson, 771 F.3d at 566 (holding that an arbitration agreement did not exist between a consumer and a satellite radio provider when a copy of the agreement was not provided upon the purchase of a vehicle). Nor is it a case where the circumstances surrounding the transaction are inadequate to alert the plaintiff to an agreement's existence. See Windsor Mills, Inc., 5 Cal. App. 3d at 994 (holding that a yarn purchaser did not consent to an inconspicuous arbitration provision on the reverse side of an order form because the purchaser neither signed the form nor had the provision

called to its attention). Here, it is evident that Mejia - an executive with "years of prior experience in the relevant market arena" (see FAC, at ¶ 3) - was given a copy of an agreement with an accessible and conspicuous arbitration clause to which he consented by signing the PPSA and later accepting Berner's e-mail without comment. Accordingly, Paychex has satisfied its initial burden to demonstrate the existence of an arbitration agreement by a preponderance of the evidence.[2]

B. The Arbitration Agreement Encompasses this Dispute

The court must now determine whether the instant dispute is covered by the arbitration clause of the PPSA. CLF argues its claims fall outside of the scope of the clause. The court disagrees.

"It is well established 'that where the contract contains an arbitration clause, there is a presumption of arbitrability.'" Comedy Club, Inc. v. Improv West Assocs., 553 F.3d 1277, 1284 (9th Cir. 2009)(quoting AT & T Techs., Inc., 475 U.S. at 650). Thus, while the court employs general state law principles of contract interpretation to determine the scope of an arbitration clause, it must do so "'while giving due regard to the federal policy in favor of arbitration by resolving ambiguities as to the scope of arbitration in favor of arbitration.'" Mundi v. Union Sec. Life Ins. Co., 555 F.3d 1042, 1044 (9th Cir. 2009)(quoting Wagner v. Stratton Oakmont, Inc., 83 F.3d 1046, 1049 (9th Cir. 1996)). Indeed, "[t]he Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).

"The standard for demonstrating arbitrability is not high." Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 719 (9th Cir. 1999). "[T]he most minimal indication of the parties' intent to

[2] In its opposition, CLF objects to the additional seven pages of the PPSA for lack of authentication. That objection is moot in light of Berner's declaration because she has personal knowledge of Paychex's business dealings with CLF, and is qualified to state whether or not the additional seven pages were made part of the PPSA.

arbitrate must be given full effect." Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469, 478 (9th Cir. 1991). Stated another way, the aggrieved party's "factual allegations need only 'touch matters' covered by the contract containing the arbitration clause." Simula, Inc., 175 F.3d at 721.

Here, the PPSA's arbitration clause applies to "any dispute arising out of, or in connection with, the Agreement," including "disputes about the formation, interpretation, applicability, or enforceability" of the PPSA. This language is facially broad, and has been interpreted to apply to all aspects of the signatories' business relationship. See Schoenduve Corp. v. Lucent Techs., Inc., 442 F.3d 727, 732 (9th Cir. 2006). The court therefore concludes that the PPSA's arbitration clause encompasses CLF's claims against Paychex, Inc. and Paychex Insurance Agency, Inc. since Plaintiff treats them as one entity in the FAC and alleges it hired Paychex for payroll and insurance services in October, 2013.[3] See FAC, at ¶¶ 4, 6. As pled, the FAC establishes that the engagement to obtain workers' compensation insurance coverage arose from CLF's relationship with Paychex as its payroll services provider. Id. at ¶ 6. In that way, CLF's claims "touch matters" covered by the PPSA.

CLF resists this conclusion by citing to another provision of the PPSA which it believes limits the scope of the contract as a whole. It contends that one subsection of paragraph 25 entitled "Workers' Compensation Report Service" excludes the procurement of workers' compensation insurance coverage from the PPSA entirely.[4] CLF's interpretation, however, is not

[3] For similar reasons, the court rejects CLF's argument that Paychex Insurance Agency, Inc. cannot move to compel arbitration as a non-signatory to the PPSA.

[4] The subsection states:

> **Workers' Compensation Report Service.** Paychex will provide Client a monthly report with the calculated workers' compensation premium amounts consisting of the payroll wages and workers' compensation premiums in each class code for each payroll processed by Client ("Report"). Additional reports may be purchased for an additional fee. The Service does not include the sale of workers' compensation insurance coverage ("Coverage") and

necessarily supported by a plain reading of the subsection. Indeed, it appears the purpose of the language is to clarify that workers' compensation insurance coverage is not included in the report service; it does not altogether exclude the procurement of coverage from the agreement. In any event, any difference in the parties' interpretation of this subjection does not preclude the entry of an order compelling arbitration since the arbitration clause in the PPSA covers such disagreements.

CLF also claims a separate, earlier-formed oral agreement applies to the procurement of workers' compensation insurance coverage rather than the PPSA. This argument is unpersuasive under these circumstances, however. CLF has not produced authority which holds that the mere existence of another agreement precludes the enforcement of an arbitration clause in an independent contract between the same parties covering the same or similar subject matter. The case relied on by CLF, Sheet Metal Workers' Int'l Ass'n Local Union No. 104 v. Natkin & Co., No. C-93-3047, 1994 U.S. Dist. LEXIS 9266, 1994 WL 361829 (N.D. Cal. July 6, 1994), is inapposite. There, it was undisputed that one of the parties had not signed the agreement requiring arbitration of grievances. Those are not the facts of this case.

In sum, CLF has only shown some doubt about the arbitrability of its claims. Such doubt must be resolved in favor of arbitration. Moses H. Cone Mem'l Hosp., 460 U.S. at 24-25; Westinghouse Hanford Co. v. Hanford Atomic Metal Trades Council, 940 F.2d 513, 517 (1991) (recognizing the presumption in favor of arbitration "applies with particular force where . . .the arbitration clause is phrased in broad and general terms."). Accordingly, the court finds the PPSA's broad arbitration clause applies to this dispute.

C. Portions of the Arbitration Clause are Unconscionable

CLF argues the PPSA's arbitration clause is unconscionable. "Under California law, a contractual clause is unenforceable if it is both procedurally and substantively unconscionable."

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is not proof of Coverage. Client is solely responsible for obtaining and maintaining any required Coverage.

Davis v. O'Melveny & Myers, 485 F.3d 1066, 1072 (9th Cir. 2007). Procedural unconscionability focuses on oppression or surprise due to unequal bargaining power, while substantive unconscionability focuses on overly-harsh or one-sided terms. Stirlen v. Supercuts, Inc., 51 Cal. App. 4th 1519, 1532 (1997).

While both types of unconscionability must be present before an arbitration agreement can be declared unenforceable, it is not necessary they be present to the same degree. Davis, 485 F.3d at 1072. For this reason, "[c]ourts apply a sliding scale: 'the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.'" Id. Furthermore, "a claim of unconscionability often cannot be determined merely by examining the face of the contract, but will require inquiry into its setting, purpose, and effect." Perdue v. Crocker Nat'l Bank, 38 Cal.3d 913, 926 (1985). The burden is on the party challenging the arbitration agreement to prove both procedural and substantive unconscionability. Serafin v. Balco Properties Ltd., LLC, 235 Cal. App. 4th 165, 178 (2015).

CLF contends the PPSA is procedurally unconscionable because it was presented on a take-it-or-leave-it basis without an opportunity to negotiate its terms. CLF is correct that the PPSA's adhesive nature imparts it with a degree of procedural unconscionability. See Soltani v. W. & S. Life Ins. Co., 258 F.3d 1038, 1042 (9th Cir. 2001) (noting the issue of procedural unconscionability "focuses on whether the contract was one of adhesion"); Kinney v. United Healthcare Servs., Inc., 70 Cal. App. 4th 1322, 1327 (1999) ("Procedural unconscionability concerns the manner in which the contract was negotiated and the circumstances of the parties at that time.").

CLF also correctly identifies the damages waiver provision as substantively unconscionable. That provision precludes the arbitrator from awarding exemplary or punitive damages, "or any damages excluded in the Limit of Liability provision" of the PPSA, which provision also exempts under all circumstances "special, indirect, incidental, or consequential or

punitive damages, including any theory of liability (including contract, tort or warranty)." This expansive liability limitation and preclusion of nearly every type of damages claim is obviously overly-harsh and one-sided, and has no other purpose than to maximize Paychex's advantage. See Bolton v. Super. Ct., 87 Cal. App. 4th 900, 910 (2001).

Additionally, CLF has met its burden to demonstrate that the forum selection clause, which designates Rochester, New York, as the arbitration situs, is substantively unconscionable. "In order to assess the reasonableness of . . . 'place and manner' restrictions, the respective circumstances of the parties become relevant." Bolter, 87 Cal. App. 4th at 909-910. Here, the relevant "respective circumstances" are these: CLF is headquartered in San Jose and "is a small business that interacted with Paychex entirely within California." See Mejia Decl., at ¶¶ 9, 12. It would "incur significant expense and great inconvenience to its business operations and employees" if ordered to arbitrate across the country. Id. at ¶ 12. Paychex, in contrast, "has offices nationwide." Id. With this disparity, "it is simply not a reasonable or affordable option for [CLF] to abandon [its] offices for any length of time to litigate a dispute several thousand miles away." Bolter, 87 Cal. App. 4th at 909.

Because the PPSA is not permeated with unconscionability, the court will sever the two unconscionable provisions. See Cal. Civil Code § 1670.5(a). The arbitration clause will otherwise be enforced.[5]

D. Conclusion

For the reasons explained, Paychex has established the two factors necessary to successfully compel arbitration. First, there exists an agreement to arbitrate between Paychex and CLF in the form of the PPSA. Second, the way in which CLF has pled this action subjects the

[5] Since the forum selection clause is unenforceable, the court will order the arbitration to occur within this district. See 9 U.S.C. § 4 ("The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed."). Accordingly, there is no reason to decide whether the court may compel the arbitration to occur in another district.

claims to the PPSA's arbitration clause. Once the unconscionable provisions are severed, this action must proceed to arbitration. See Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 218 (1985) ("[D]istrict courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.").

With that result, the court need not address Paychex's remaining requests. See 9 U.S.C. § 3. Such relief will be therefore be denied.

IV. ORDER

Based on the foregoing, Paychex's Motion to Compel Arbitration, or Transfer Venue and Stay Proceedings, or Dismiss (Docket Item No. 21) is GRANTED IN PART and DENIED IN PART as follows:

1. The provisions of the PPSA that (1) require arbitration occur in Rochester, New York, and (2) preclude the arbitrator from awarding "exemplary or punitive damages, or any damages excluded in the Limit of Liability provision," are severed from the arbitration clause.
2. The motion to compel arbitration is granted based on the arbitration clause as modified above. The arbitration shall occur within the geographic boundaries of this judicial district.
3. The remainder of the motion is denied pursuant to 9 U.S.C. § 3.

This action is STAYED in its entirety pending the final resolution of the arbitration. The Clerk shall ADMINISTRATIVELY CLOSE this case.

IT IS SO ORDERED.

Dated: July 20, 2015

EDWARD J. DAVILA
United States District Judge